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Bumimetro Construction Sdn Bhd v Lee Kok Hwa & Anor and another suit

HIGH COURT (SHAH ALAM) — CIVIL SUIT NOS 22–792 OF 2010 AND 22NCVC-877 OF 2011
LIM CHONG FONG JC
11 JUNE 2014

Contract — Brokerage contract — Commission — Whether contract sham to facilitate payment of bribe — Whether insufficient evidence for court to conclude contract illegal — Whether standard of proof required to establish contract tainted with illegality higher than proof on balance of probabilities — Whether defendants breached obligations under contract and liable to pay damages and to make restitution

A poser before the High Court at the trial of the consolidated suits herein was whether a hastily-drawn up contract between the plaintiff ('Bumimetro') and the defendants ('Lee' and 'Yap') in the first suit was a genuine brokerage contract or whether it was a sham to facilitate the payment by Bumimetro of a bribe to secure for itself a building subcontract from a third party ('Binary Vista'). Contrary to the defendants' allegation that the contract was tainted with illegality and ought to be struck down, Bumimetro asserted that it was a brokerage contract under which it agreed to pay the defendants RM3m in commission if they helped Bumimetro secure the RM193m subcontract. Payment of the commission was divided into three stages — the first sum of RM250,000 when the defendants set up a meeting with Binary Vista to discuss the securement of the subcontract thereafter, RM1.5m upon, inter alia, Lee's issuance of a personal cheque to Bumimetro for RM1.5m as guarantee; and the final payment of RM1.25m when, inter alia, Bumimetro received the letter of award for the subcontract from Binary Vista. The contract provided that the defendants would refund the monies paid if Bumimetro failed to be awarded the subcontract. After paying RM1.75m (the first and second payments) to Lee and to two other parties at Lee's request and receiving Lee's post-dated guarantee cheque for RM1.5m, Bumimetro discovered that Binary Vista had no intention to directly award it the subcontract and that Bumimetro had to openly tender for the project along with other interested parties. Bumimetro demanded the refund of monies paid after finding Lee's RM1.5m cheque bad for payment. Bumimetro met with Yap about the refund following which the plaintiff in the second suit, Projek Serimaju Sdn Bhd ('Projek Serimaju') paid RM500,000 to Bumimetro. Projek Serimaju was a company jointly owned by Yap and Lee's son. In the second suit, Projek Serimaju claimed for the return of the RM500,000 alleging that it was a friendly loan to Bumimetro. The first suit only proceeded against Yap as Lee was adjudged a bankrupt before the trial.

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Held, allowing Bumimetro's claim against Yap and dismissing Projek Serimaju's claim:

(1) Although the contract between Bumimetro and the defendants contained several questionable features, the court was unable to safely conclude that it was a sham. The likelihood that bribery had been committed was a serious matter that warranted a higher standard of proof than the ordinary civil standard of proof on balance of probabilities. If the language used in the agreement resulted in ambiguity, the court should lean against finding the agreement to be illegal. Consequently, the contention that the agreement was tainted with illegality was rejected (see paras 38 & 48–49).

(2) The court found Bumimetro had fulfilled its obligations to the defendants to the extent of paying RM1.75m partly to Lee and partly to the third parties on Lee's request. As these payments were properly made in discharge of the company's obligations under the contract, it was not a situation of unlawful under counter payment of money and the agreement was in this sense untainted (see paras 30 & 34).

(3) Both Lee and Yap were in breach of the contract for not refunding the payments made by Bumimetro. Both of them had been unjustly enriched as a result. Yap was liable to pay damages to Bumimetro for breach of contract. Since Yap testified that she was entitled to an undisclosed share of the commission payment, she must, alternatively, in lieu of paying damages, refund the money received to Bumimetro in restitution. Accordingly, judgment was entered for Bumimetro against Yap in the sum of RM1.25m with pre-judgment interest on that sum at 4%pa from 4 June 2010 until date of judgment and thereafter with post-judgment interest at 5%pa until full realisation (see paras 50, 53 & 57–58).

(4) With regard to the suit between Projek Serimaju and Bumimetro, the court found the RM500,000 was not a friendly loan but a payment by Projek Serimaju on Yap's behalf in part settlement of the monies owing to Bumimetro. Consequently, that amount had to be set-off against Bumimetro's claim of RM1.75m leaving only a balance of RM1.25m claimable in the first suit (see para 56).

[Bahasa Malaysia summary

Persoalan di hadapan Mahkamah Tinggi semasa perbicaraan saman disatukan di sini adalah sama ada kontrak yang dibuat tergesa-gesa antara plaintif ('Bumimetro') dan defendan ('Lee' dan 'Yap') dalam saman pertama adalah kontrak broker yang benar atau sama ada palsu untuk memudahkan pembayaran oleh Bumimetro sebagai sogokan untuk jaminan mereka satu subkontrak bangunan daripada pihak ketiga ('Binary Vista'). Bertentangan dengan dakwaan defendan bahawa kontrak itu telah dicemari dengan kepenyalahan undang-undang dan patut ditolak, Bumimetro menegaskan

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bahawa ia adalah satu kontrak broker yang mana ia bersetuju untuk membayar defendan RM3 juta dalam komisyen jika mereka membantu Bumimetro mendapatkan subkontrak yang bernilai RM193 juta. Pembayaran komisyen dihagikan kepada tiga peringkat — jumlah pertama RM25,000 bila defendan mengatur satu mesyuarat dengan Binary Vista untuk berbincang jaminan mendapatkan subkontrak selepas itu, RM1.5 juta pada, antara lain, pengeluaran cek tunai kepada Bumimetro sebanyak RM1.5 juta oleh Lee sebagai jaminan; dan bayaran akhir berjumlah RM1.25 juta apabila, antara lain, Bumimetro menerima surat award bagi subkontrak daripada Binary Vista. Kontrak itu mensyaratkan bahawa defendan akan mengembalikan semula wang yang dibayar jika Bumimetro gagal untuk diawardkan dengan subkontrak. Selepas membayar RM1.75 juta (bayaran pertama dan kedua) kepada Lee dan dua pihak lain atas permintaan Lee dan menerima cek jaminan lepas tempoh berjumlah RM1.5 juta daripada Lee, Bumimetro mendapati bahawa Binary Vista tidak mempunyai niat untuk mengawardkan subkontrak secara terus dan bahawa Bumimetro telah secara terbuka menender untuk projek itu bersama-sama dengan pihak-pihak lain yang berkepentingan. Bumimetro menuntut bayaran balik wang yang dibayar selepas mendapati cek berjumlah RM1.5 juta daripada Lee tidak laku. Bumimetro berjumpa dengan Yap berkenaan bayaran balik berikutan plaintif dalam saman kedua, Projek Serimaju Sdn Bhd ('Projek Serimaju') membayar RM500,000 kepada Bumimetro. Projek Serimaju adalah syarikat milik bersama Yap dan anak Lee. Dalam saman kedua, Projek Serimaju menuntut untuk pengembalian RM500,000 mendakwa bahawa ia adalah pinjaman mesra kepada Bumimetro. Saman pertama hanya diteruskan ke atas Yap memandangkan Lee telah dihukumkan bankrap sebelum perbicaraan.

Diputuskan, membenarkan tuntutan Bumimetro terhadap Yap dan menolak tuntutan Projek Serimaju:

(1) Walaupun kontrak antara Bumimetro dan defendan-defendan mengandungi beberapa ciri yang boleh dipersoalkan, mahkamah tidak dapat memutuskan dengan selamat bahawa ia adalah palsu. Kemungkinan bahawa rasuah telah dilakukan adalah perkara serius yang mewajarkan standard pembuktian yang lebih tinggi daripada standard pembuktian sivil biasa atas imbangan kebarangkalian. Jika bahasa yang digunakan dalam perjanjian menyebabkan kekaburan, mahkamah seharusnya mengambil perjanjian itu adalah menyalahi undang-undang. Oleh itu, pendapat bahawa perjanjian itu telah dicemari dengan kepenyalahan undang-undang ditolak (lihat perenggan 38 & 48–49).

(2) Mahkamah mendapati Bumimetro telah memenuhi obligasinya kepada defendan ke tahap membayar RM1.75 juta kepada Lee dan sebahagian kepada pihak ketiga atas permintaan Lee. Memandangkan bayaran-bayaran dibuat dengan betul dalam melepaskan obligasi syarikat di bawah kontrak, ia bukanlah keadaan pembayaran secara haram yang

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menyalahi undang-undang dan perjanjian itu dalam pengertian ini tidak tercemar (lihat perenggan 30 & 34).

(3) Kedua-dua Lee dan Yap melanggar kontrak kerana tidak membayar balik pembayaran-pembayaran dibuat oleh Bumimetro. Kedua-dua mereka telah dengan salah mengayakan mereka sebagai akibatnya. Yap bertanggungjawab untuk membayar ganti rugi kepada Bumimetro untuk pelanggaran kontrak. Memandangkan Yap memberi keterangan bahawa dia berhak kepada saham tidak diisytihar pembayaran komisyen, dia perlu, secara alternatif, membayar ganti rugi sebagai ganti, membayar balik wang yang diterima kepada Bumimetro dalam pengembalian (lihat perenggan 50, 53 & 57–58).

(4) Berkenaan dengan saman antara Projek Serimaju dan Bumimetro, mahkamah mendapati RM500,000 bukanlah pinjaman mesra tetapi pembayaran oleh Serimaju atas pihak Yap dalam sebahagian penyelesaian wang terhutang kepada Bumimetro. Oleh itu, jumlah itu telah ditolak terhadap tuntutan Bumimetro berjumlah RM1.75 juta meninggalkan hanya baki RM1.25 juta yang boleh dituntut dalam saman pertama (lihat perenggan 56).]

Notes

For cases on commission, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3488–3490.

Cases referred to

Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd [2007] 2 MLJ 301, FC (refd)

Bater v Bater [1951] P 35, CA (refd)

Deutsche Genossenschaftsbank v Burnhope and others [1995] 4 All ER 717, HL (refd)

Investor's Compensation Scheme Ltd v West Bromich Building Society, Investor's Compensation Scheme Ltd v Hopkin & Sons (a firm), Alford v West Bromich Building Society, Armitage v West Bromich Building Society [1998] 1 WLR 896, HL (refd)

Kirin-Amgen Inc and others v Hoechst Marion Roussel Ltd and others [2005] RPC 169, HL (refd)

Ong Thean Chye & Ors v Tiew Choy Chai & Anor [2011] 4 MLJ 616, CA (distd)

PP v Chan Kit Tong Sally [1991] 1 MLJ 358, SC (distd)

PT International Nickel Indonesia v General Trading Corpn (M) Sdn Bhd [1978] 1 MLJ 1, CA (refd)

Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong [1998] 3 MLJ 151, FC (refd)

Saminathan v Pappa [1981] 1 MLJ 121, PC (refd)

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Sirius International Insurance Co (Publ) v FAI General Insurance Ltd [2004] 1 WLR 3251, HL (refd)
Tang Meng Hock v Tang Ming Seng [2010] 1 MLJ 33, CA (refd)
Tay Choo Foo @ Tay Chiew Foo v Tengku Mohd Saad @ Tengku Arifaad bin Tengku Mansur & Ors (all acting as administrators of the estate of Tunku Mansur bin Tunku Yaacob, deceased) and another appeal [2009] 1 MLJ 289, CA (refd)
Zeus Tradition Marine Ltd v Bell, The Zeus V [1999] 1 Lloyd's Rep 703 (refd)

Legislation referred to

Civil Law Act 1956 s 11
Contracts Act 1950 ss 2(d), 24
Prevention of Corruption Act 1961 (repealed by Anti-Corruption Act 1997)
Rules of Court 2012 O 42 r 12
Stamp Act 1949 s 59(1)
Valuers, Appraisers and Estate Agents Act 1981

RK Nathan (Vinod Kamalanathan with him) (Vinod Kamalanathan & Assoc) in Civil Suit No 22–792 of 2010 for the plaintiff.
R Vaithylingam (Khairul bin Mukhtar with him) (RV Lingam & Co) in Civil Suit No 22NCVC-877 of 2011 for the plaintiff.
R Vaithylingam (Khairul bin Mukhtar with him) (RV Lingam & Co) in Civil Suit No 22–792 of 2010 for the second defendant.
RK Nathan (Vinod Kamalanathan with him) (Vinod Kamalanathan & Assoc) in Civil Suit No 22NCVC-877 of 2011 for the defendant.

Lim Chong Fong JC:

INTRODUCTION

[1] This is a case of two connected suits consolidated together. The first suit is one with multiple causes of action for alleged breach of contract, conspiracy to injure, fraud and unjust enrichment that arose from a commercial brokerage contract. The second suit is for a straight forward recovery of friendly loan.

[2] In the first suit, the plaintiff Bumimetro Construction Sdn Bhd (Company No 576189-W) is a construction contracting company whilst the first defendant Lee Kok Hwa (NRIC No 500428-07-5443) and the second defendant Yap Kim Yoong (NRIC No 590613-10-6522) are individuals and partners in business.

[3] As for the second suit, the plaintiff Projek Serimaju Sdn Bhd (Company No 842010-V) is a company jointly owned by the second defendant and son of the first defendant of the first suit. The defendant is the plaintiff in the first suit.

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For ease of reference, the parties will be addressed hereinafter by their names.

THE TRIAL PROCESS

[4] The trial of these suits took a day comprising of a half day each on 10–11 March 2014. The documentary evidence adduced at the trial is trial bundles B, C and D. Lee Kok Hwa has been adjudged a bankrupt before the trial. Since no leave to proceed against him was obtained from the commercial court and neither did the official assignee appear, the trial of the first suit proceeded only against Yap Kim Yoong. The following witnesses testified at the trial for the respective parties:

(a) Tan Ching Peng ('PW1') who is a director and shareholder of Bumimetro Construction;

(b) Wong Chee Weng ('PW2') who is also a director and shareholder of Bumimetro Construction and its chief executive officer;

(c) Yap Kim Yoong ('DW1') who is the second defendant herself in the first suit and a director and shareholder of Projek Serimaju in the second suit; and

(d) Lee Ming Lee ('DW2') who is the son of Lee Kok Hwa and a director and shareholder of Projek Serimaju.

Lee Kok Hwa was not called to testify in both suits. He is still a competent witness notwithstanding that he is a bankrupt.

[5] After the trial, the parties concurrently submitted their written closing submissions. There was an oral clarification on the submissions held on 15 May 2014 and the parties thereafter submitted further written submissions to address certain issues to be further clarified.

BACKGROUND FACTS

[6] There was a building project that was secured by a Binary Vista Sdn Bhd ('Binary Vista') as the contractor for the construction of the headquarters of the Lembaga Hasil Dalam Negeri in Cyberjaya Selangor ('the project').

[7] Lee Kok Hwa and an architect by the name of Lawrence Lim Aun Giap ('the architect') were aware of the project and approached Bumimetro Construction to participate as subcontractor. Bumimetro Construction was interested and a meeting was organised to discuss the subcontracting of the project. Lee Kok Hwa represented to Bumimetro Construction that they were brokers that arrange for meetings between employer and contractor. The remuneration would be by way of commission from both parties they arranged.

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[8] The meeting between the parties in the first suit together with the architect took place on 3 April 2009. It was immediately followed with a written agreement executed ('initial agreement') as drawn up by Bumimetro Construction. At that point, Bumimetro Construction paid to a Yee Hon Cheong RM250,000 in cash at the request of Lee Kok Hwa towards payment under the initial agreement. By reason that the initial agreement did not cater and reflect the RM250,000 that was paid, the parties in the first suit subsequently executed another written agreement ('final agreement') that varied the initial agreement. Both the initial agreement and final agreement were dated as 17 April 2009.

[9] The final agreement reads as follows:

PROJEK PEMBINAAN BANGUNAN IBU PEJABAT LEMBAGA HASIL DALAM NEGERI MALAYSIA (LHDNM) DI CYBERJAYA, SELANGOR DARUL EHSAN

DATE 17th APRIL 2009

AGREEMENT ON THE SECUREMENT OF THE SUBCONTRACT BASE ON TOTAL ASSIGNMENT

We Bumimetro Construction Sdn Bhd (Company No. 576189-W) agree to pay the Earnest Money (Refundable) to :-

(a) Mr. Lee Kok Hwa (NRIC No. 500428-07-5443)

(b) Madam Yap Kim Yoong (NRIC No. 590613-10-6522)

(1) 1st STAGE PAYMENT — RM 250,000.00

a) Mr. Lee Kok Hwa and Madam Yam Kim Yoong agree to set up a meeting with the Main Contractor who secure the above contract and to have further discussion with the person in charge on the nature of the contract and any technical issues arise.

(2) 2nd STAGE PAYMENT — RM 1,500,000.00

(a) Mr. Lee Kok Hwa and Madam Yap Kim Yoong undertake and agree that the total value of subcontract to be awarded by Binary Vista Sdn Bhd is amounting to a, Lump Sum Price of RM 193,000,000.00 (One Hundred Ninety Three million) base on the following scope of works :-

(i) Site Cleaning and Earthworks

(ii) Piling Works

(iii) Building Works

(iv) ICT (The value for the ICT works is base on RM 25 million and shall subject to adjustment of the contract value)

(v) M &E Works except District Cooling System

(vi) ID Furniture Works

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The works that stated above are base on lump sum except ICT and shall not subject to any adjustment of price in term of rate and quantity.

The scope of works exclude from the above subcontract price are as follows :-

(i) Consultant's Fee

(ii) Authorities' Contribution Fee

(iii) Compliance of Class F subcontracts

(iv) Any works not described in the Bills of Quantities and shown in the drawings

(b) The subcontracts works shall be based on total assignment from Binary Vista Sdn Bhd to Bumimetro Construction Sdn Bhd and the payment shall be paid through escrow account.

(c) Prior to the issuance of the Letter of Award from Binary Vista Sdn Bhd to mobilize our machinery to commence the Site Clearing or any temporary works required under the contract.

(d) Mr. Lee Kok Hwa agrees to issue a personal cheque of RM 1,500,000.00 to Bumimetro Construction Sdn Bhd as guarantee and security for the release of the above said amount.

3rd STAGE OF PAYMENT — RM 1,250,000.00

(a) Upon issuance of Letter of Award by Binary Vista Sdn Bhd to Bumimetro Construction Sdn Bhd base on total assignment of subcontract. The awarded amount is agreed at RM 193,000,000.00 (One Hundred Ninety Three Million).

(b) Mr. Lee Kok Hwa and Madam Yap Kim Yoong agree to furnish a copy of the Letter Of Award issued by Jabatan Kerja Ray a to Binary Vista Sdn Bhd for Bumimetro Construction Sdn Bhd to view and for the purposes to apply for financing facilities with the financial institution.

In the event Binary Vista Sdn Bhd fails to award the above said subcontract within thirty (30) days from the last disbursement of the earnest money base on the terms as stated above, Mr. Lee Kok Hwa and Madam Yap Kim Yoong agree to refund the full earnest money that have been paid to Bumimetro Construction Sdn Bhd within seven (7) days.

[10] The payment of the aforesaid RM250,000 by Bumimetro Construction was deemed the first stage payment under the final agreement.

Bumimetro Construction thereafter made the following payments totaling to RM1,500,000 towards the second stage payment under the final agreement:

(a) RM500,000 on 17 April 2009 by cheque to Lee Kok Hwa;

(b) RM200,000 on 17 April 2009 by cheque to a Nikkisia Industries Sdn Bhd a company connected to Lee Kok Hwa at the latter's request;

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(c) RM300,000 on 17 April 2009 by telegraphic transfer also to Nikkisia Industries Sdn Bhd at the request of Lee Kok Hwa; and

(d) RM500,000 on 20 April 2009 by cheque to Lee Kok Hwa.

[11] Lee Kok Hwa in reciprocity as required under the final agreement issued a post-dated cheque dated 31 August 2009 for RM1,500,000 as security against the second stage payment payable pursuant to the final agreement.

[12] Subsequently, Bumimetro Construction together with Lee Kok Hwa and Yap Kim Yoong met Binary Vista as arranged pursuant to the final agreement. It was discovered at the meeting that there was no undertaking whatsoever furnished by Binary Vista that Bumimetro Construction would be awarded the subcontract for the project. Bumimetro Construction was instead required to tender for the project as any other subcontractor if Bumimetro Construction remained interested to participate in the project.

[13] Both Lee Kok Hwa and Yap Kim Yoong could not answer to Bumimetro Construction when subsequently confronted and questioned on the outcome of the meeting. Accordingly Bumimetro Construction demanded for the refund of the RM1,750,000 already paid pursuant to the final agreement.

[14] Following repeated demands by Bumimetro Construction for refund of the payments, Projek Serimaju issued a cheque of RM500,000 to Bumimetro Construction after a meeting that was held on 4 August 2009 between PW1 and Yap Kim Yoong.

[15] Bumimetro Construction also banked the post-dated cheque dated 31 August 2009 of RM1,500,000 drawn by Lee Kok Hwa that was given to Bumimetro Construction as security. The cheque was later found to be bad and thus uncashable because it was an old one that did not conform to the eSpick design standard required by Bank Negara Malaysia.

[16] Accordingly Bumimetro Construction demanded Lee Kok Hwa to reissue a fresh cheque. Lee Kok Hwa refused or neglected to do so notwithstanding the formal written demand made by the solicitors of Bumimetro Construction dated 5 November 2009. The plaintiff thereafter lodged a police report against Lee Kok Hwa for deceit on 6 November 2009.

[17] By reason of non-receipt of the refund of the payments made a fore described, Bumimetro Construction filed the first suit against Lee Kok Hwa on 3 August 2010 and by amendment added Yap Kim Yoong on 24 August 2011.

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[18] In the meantime Projek Serimaju filed the second suit on 29 July 2011 to recover against Bumimetro Construction for non-repayment of the friendly loan of RM500,000 that was given to Bumimetro Construction.

THE CONTENTIONS IN THE FIRST SUIT

[19] Bumimetro Construction's claim in the first suit is principally for the refund of RM1,250,000; to wit RM1,750,000 paid pursuant to the final agreement minus RM500,000 received from Projek Serimaju as part refund.

[20] Learned counsel for Bumimetro Construction, Dato' RK Nathan argued as follows:

(a) Lee Kok Hwa and Yap Kim Yoong gave the undertaking that Bumimetro Construction would be awarded the subcontract by Binary Vista although both of them knew they were not empowered to provide such an undertaking;

(b) both of them purposely misrepresented to Bumimetro Construction to induce Bumimetro Construction to believe that they were able to secure for Bumimetro Construction the subcontract from Binary Vista in consideration of the commission payment of RM3,000,000 and they had collected RM1,750,000 therefrom;

(c) both of them falsely promised that they were capable to ensure that Bumimetro Construction would secure the subcontract at the subcontract sum and on such terms as stated in the final agreement;

(d) both of them misled Bumimetro Constructions by giving the false undertaking knowing at all material times that the undertaking was invalid;

(e) both of them deceived Bumimetro Construction that they were genuine brokers;

(f) Lee Kok Hwa knew that he did not have the financial capability nevertheless issued a post-dated cheque of RM1,500,000 to guarantee the refund of the payment made by Bumimetro Construction pursuant to the final agreement;

(g) Lee Kok Hwa knew that the post-dated cheque issued by him was not a good tender as at 1 September 2009 failed and/or refused to reissue a valid cheque for the sum of RM1,500,000 notwithstanding requests to do so by Bumimetro Construction; and

(h) both Lee Kok Hwa and Yap Kim Yoong failed to uphold their bargain under the final agreement.

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[21] Accordingly, Dato' Nathan contends that the actions of Lee Kok Hwa and Yap Kim Yoong constituted fraud besides breaches of the final agreement.

[22] It is moreover contended that Lee Kok Hwa and Yap Kim Yoong conspired with Yee Hon Cheong to defraud Bumimetro Construction including having deceived Bumimetro Construction that Yee Hon Cheong was the manager of the Lee Kok Hwa and Yap Kim Yoong who was authorised to receive the RM250,000 payment from Bumimetro Construction.

[23] Finally it is also contended that both Lee Kok Hwa and Yap Kim Yoong have in the circumstances been unjustly enriched and must accordingly refund Bumimetro Construction.

[24] The joint defence of Lee Kok Hwa and Yap Kim Yoong in the first suit as argued by learned counsel Mr RV Lingam are briefly that:

(a) the final agreement is unenforceable because it is unstamped;

(b) the final agreement is a sham that is tainted with illegality; and

(c) Bumimetro Construction failed to prove its case on the causes of action relied upon as pleaded.

Accordingly, Bumimetro Construction's claims are unsustainable.

THE CONTENTIONS IN THE SECOND SUIT

[25] In the second suit, Mr Lingam argues that Bumimetro Construction failed and/or refused to pay on demand the repayment of the sum of RM500,000 pursuant to the friendly loan obtained from Projek Serimaju.

[26] It is responded by Dato' Nathan in defence that there was no friendly loan and the payment of the sum of RM500,000 was part settlement of the sum of RM1,750,000 owed to Bumimetro Construction.

FINDINGS OF THE COURT

[27] I will deal with the first suit on such parts that concern Yap Kim Yoong to be followed by the second suit.

[28] The convenient starting point is the background of the final agreement. It is seen that the agreement was entered into by the parties and performed in haste probably to quickly wrap up the subcontracting deal with Binary Vista. They met on or around 3 April 2009 and immediately penned down their agreement. There was the initial agreement drawn up and executed with Bumimetro Construction paying RM250,000 in advance on 3 April 2009

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without a stipulation thereto in the initial agreement. The revised final agreement was then drawn up to vary and cater for this 250,000 payment. Both initial and final agreement were dated 17 April 2009 and nobody testified as to why the initial agreement was still maintained when it was no longer relevant on that date.

[29] Be that as it may, it is clear as testified by PW1 that Bumimetro Construction paid RM250,000 to Yee Hon Cheong on 3 April 2009. It was through five cash cheques of RM50,000 of Bumimetro Construction encashed by a Mohd Ali bin Leman, the driver of PW2 who handed the monies to PW1 who then paid to Yee Hon Cheong during the meeting as requested by Lee Kok Hwa. Yee Hon Cheong is the nephew of Yap Kim Yoong. Furthermore on 17 April 2009, the day of execution of the final agreement, Bumimetro Construction paid further sums of RM500,000 to Lee Kok Hwa by cheque and RM200,000 and RM300,000 to a Nikissia Industries Sdn Bhd by cheque and telegraphic transfer respectively at the request of Lee Kok Hwa. Subsequent to the execution of the final agreement, a further sum of RM500,000 was paid to Lee Kok Hwa by cash cheque on 20 April 2009. These payments were supported by cogent documentary evidence and unrebutted particularly by the non-calling of the Lee Kok Hwa as witness. Yap Kim Yoong testified that she was a mere bystander at the meeting and negotiations on the initial and final agreement were all conducted by Lee Kok Hwa. Nonetheless she voluntarily without any reservation co-signed the initial and final agreement with Lee Kok Hwa. She has also not challenged that the payments were wrongly made to Yee Hon Cheong and Nikissia Industries Sdn Bhd as requested by Lee Kok Hwa. I therefore find and hold that both of them are accordingly bound jointly by the final agreement with Bumimetro Construction.

[30] In the circumstances, I further find and hold that Bumimetro Construction has fulfilled its obligations to Lee Kok Hwa and Yap Kim Yoong to the extent of payment made in the sum of RM1,750,000 pursuant to the final agreement. The money was paid partly to Lee Kok Hwa directly and partly to the third parties, Nikissia Industries Sdn Bhd and Yee Hon Cheong as requested. The payment to these third parties is good consideration on the part of Bumimetro Construction being the promisee when so desired by Lee Kok Hwa being one of the joint promisors because of s 2(d) of the Contracts Act 1950.

[31] The issue of non stamping of the final agreement as raised by Mr Lingam pursuant to s 59(1) of the Stamp Act 1949 is no longer of concern here as Bumimetro Construction has stamped the final agreement in the course of the trial as directed by me.

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[32] The next crucial issue is whether the final agreement is a sham contract that is tainted with illegality. As far as Bumimetro Construction is concerned, Dato' Nathan argues that it is a genuine brokerage contract as represented to PW1 and PW2 by Lee Kok Hwa. The commission payments were properly made pursuant thereto as remuneration in consideration of the brokering services rendered. On the other hand, Mr Lingam asserts that it was a contract that involved 'under counter' money paid to the third parties. In this respect, the pleading on illegality in para 19 of the defence is vague. There were no further and better particulars sought by Bumimetro Construction at the pre-trial stage. At the trial during cross-examination of Bumimetro Construction's witnesses, Mr Lingam clarified that under counter money connoted a bribe and stated that the third parties involved were Yee Hon Cheong, Mohd Ali bin Leman and Nikkisia Industries Sdn Bhd. He however conceded that he did not know the reason the money was paid to these third parties but maintains that when a person pays money, he must know the purpose; otherwise it is under counter money. This proposition of Mr Lingam is however inconsistent with the testimony of Yap Kim Yoong that the payments were to be ultimately shared amongst Lee Kok Hwa, Yee Hon Cheong, the architect and her.

[33] Learned counsel Mr Lingam also referred to the Supreme Court case of *Public Prosecutor v Chan Kit Tong Sally* [1991] 1 MLJ 358 that the interpretation of gratification in the Prevention of Corruption Act 1961 is wide enough to include the sum paid as under counter money and the person who received the gratification need not be a public officer.

[34] I find Mr Lingam's argument and explanation of the under counter money misconceived. Though payment of under counter money may constitute an act of corruption and therefore taints the agreement made with illegality, the facts in *Public Prosecutor v Chan Kit Tong Sally* are distinguishable. In that case Sally acted in conflict of interest by directly profiting from the under counter payment made to her directly which should properly have been paid to Sally Development and Realty Sdn Bhd. Since I have found in this case that the payments to Yee Hon Cheong and Nikkisia Industries Sdn Bhd were properly made by Bumimetro Construction as directed by Lee Kok Hwa in good discharge of its obligation under the final agreement, this is definitely not a situation of unlawful under counter money paid. The final agreement is in this sense thus untainted.

[35] Be that as it may, the critical question that bothers me is whether the consideration pursuant to the final agreement is illegal. In other words, is the object of the final agreement a sham being a bribe disguised as a brokerage arrangement? Put it in another way, is the payment under the final agreement truly a commission fee or a payment to finance a bribe? If so, the final

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agreement is void as declared by s 24 of the Contracts Act 1950 as expounded by the Federal Court in *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151. The effect of a contract tainted with bribery is seen in *PT International Nickel Indonesia v General Trading Corpn (M) Sdn Bhd* [1978] 1 MLJ 1 where it could not form the basis of a claim in court.

[36] In the Court of Appeal case of *Ong Thean Chye & Ors v Tiew Choy Chai & Anor* [2011] 4 MLJ 616 Abdul Malik Ishak JCA whilst construing the contract to ascertain whether the contract was a sham held: '[22] ... Colman J in *Zeus Tradition Marine Ltd v Bell, The Zeus V* [1999] 1 Lloyd's Rep 703 at p 706 said that: References to the meaning which would be conveyed to a 'reasonable person' (see Lord Hoffman in *Investor's Compensation Scheme Ltd v West Bromich Building Society, Investor's Compensation Scheme Ltd v Hopkin & Sons (a firm), Alford v West Bromich Building Society, Armitage v West Bromich Building Society* [1998] 1 WLR 896 at p 912) are merely another and familiar way of expressing the judicial process of inference from admissible primary evidence. [23] *Pure and simple, interpretation involves the ascertainment of the meaning the document would convey to a reasonable person who has all the background knowledge about the situation surrounding the formation of the contract* ... [24] The objective nature of interpretation has been repeatedly stressed by Lord Steyn in *Deutsche Genossenschaftsbank v Burnhope and others* [1995] 4 All ER 717 (HL) as well as in *Sirius International Insurance Co (Publ) v FAI General Insurance Ltd* [2004] 1 WLR 3251. And in the latter case at p 3257, Lord Steyn aptly said: *The aim of the inquiry is not to probe the real intention of the parties to ascertain the contextual meaning of the relevant contractual language. The inquiry is objective: the question is what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of specific language.* The answer to that question is to be gathered from the text under consideration and its contextual sense. [25] Even Lord Hoffman in *Kirin-Amgen Inc and others v Hoechst Marion Roussel Ltd and others* [2005] RPC 169,185 emphasised that construction of a document is an objective exercise and this was what he said: 'Construction is objective in the sense that it is concerned with what a reasonable person to whom the utterance was addressed would have understood the author to be using the words to mean.' (Emphasis added.)

[37] My task accordingly is to construe the wordings in the final agreement herein against the background facts and decipher whether the object as well as the consideration therein was for a bribe or inducement to secure the subcontract or that it was an ordinary brokerage transaction. This is necessarily an objective evaluation that is independent of the subjective assertions of the parties.

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[38] Upon construing the final agreement as a whole, I have observed several noticeable and questionable features: A

(a) firstly, there is no explicit express provision therein that it is a brokerage arrangement. In fact it is entitled an 'Agreement on the Securement of the Subcontract base on Total Assignment'; B

(b) secondly, the payments to the defendants therein are not explicitly expressed to be the fee or commission for the brokerage arrangement;

(c) thirdly, the total amount of the payments to the defendants amounted to RM3,000,000 which is about 1.6% of the proposed subcontract sum if Bumimetro Construction had secured the subcontract from Binary Vista. The amount receivable herein is notably high compared to the risks assumed and services rendered by the broker; C

(d) fourthly, the scheduling of the payment installments by Bumimetro Construction to Lee Kok Hwa and Yap Kim Yoong is front loaded in that approximately 60% of the payment is payable before Bumimetro Construction even gets to meet Binary Vista, let alone secure the subcontract; and D

(e) fifthly and very importantly, both Lee Kok Hwa and Yap Kim Yoong by cl 2(a) have expressly undertaken that the subcontract would be awarded by Binary Vista to Bumimetro Construction on the basis and terms intended by Bumimetro Construction. E

[39] There is no evidence led to explain how Lee Kok Hwa or Yap Kim Yoong was in the position to give the undertaking or guarantee. Thus the final agreement could objectively have been an arrangement to bribe influential persons in Binary Vista to cause Binary Vista to award the subcontract to Bumimetro Construction. In such case Lee Kok Hwa would likely have been the arrangor or caused the arrangement of the bribe and the payments under the final agreement were wholly or partly the inducement to get the subcontract awarded to Bumimetro Construction. F G

[40] I also noted that the defence of Yap Kim Yoong on the final agreement being a sham has not been pleaded nor argued in this manner. I have nevertheless at the clarification on 15 May 2014 requested counsel for both parties to address me further on this crucial issue. H

[41] Learned counsel Dato' Nathan strenously maintains that the final agreement is a genuine and true brokerage agreement and that there has been no evidence adduced by the opposite side that the payments were for a bribe. It is pointed out that Yap Kim Yoong even in her testimony denied there was payment of a bribe or even under counter money. The payments pursuant to the final agreement were plainly commission for brokerage services. I

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[42] Mr Lingam however argued that the final agreement must be objectively construed and the test to be adopted is the ascertainment of the meaning to which a document would convey to a reasonable person who has all the background knowledge about the situation surrounding the formation of the contract. It is submitted by Mr Lingam that the facts herein are similar to that in *Ong Thean Chye v Tiew Choy Chai & Anor* and the final agreement here that was clothed with pretended obligations ought to be accordingly struck down for illegality.

[43] Contrary to Mr Lingam's submission, I find that the facts in *Ong Thean Chye v Tiew Choy Chai & Anor* are clearly different and distinguishable from the facts herein. In that case, there was an overcharged fee by the real estate agent contrary to the Valuers, Appraisers and Estate Agents Act 1981. The fee included under counter money which was part of the true sale and purchase price of the property payable to the vendors but claimed by the real estate agent as their own fee.

[44] As to the objective construction of the final agreement, I have observed that it was drafted by Bumimetro Construction hastily and probably without the input of an advocate and solicitor. Obviously the terms were in the ordinary language. In *Tang Meng Hock v Tang Ming Seng* [2010] 1 MLJ 33, the Court of Appeal held that it is the duty of the court to give effect to the bargain of the parties according to their intention in writing by looking at the words used.

[45] The wordings in the final agreement here could however have been better and clearer drafted such as to properly label the heading as a brokerage contract. The absence of such labeling does not however conclusively mean otherwise as it is the substance rather than the form that matters in construing agreements. This is particularly so for agreements drafted by lay persons.

[46] As to the undertaking in cl 2(a) of the final arrangement, though arguably it can be construed as a guarantee procured through bribery, this is not in my view necessarily so. The undertaking can also be construed as just a provision inserted by Bumimetro Construction for comfort that the subcontract as brokered must be awarded based on the details set out therein. In other words, the undertaking is more to securitise and protect Bumimetro Construction's commercial interests when the sizeable second payment installment was made under the final agreement. This interpretation is consistent with and fortified by the insertion of the payment refund provision in cl 4 of the final agreement. The undertaking made for such a purpose is hence innocuous and does not offend any public policy.

[47] In regard to the seemingly high fee or commission charged as well as the mode of the fee or commission payment, they cannot be benchmarked against

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any comparable scale of fees unlike that in *Ong Thean Chye v Tiew Choy Chai & Anor* where there is plainly a statutory scale.

[48] Notwithstanding that the final agreement has to be objectively construed to ascertain whether it is a sham tainted with illegality, the degree of probability that must be achieved in such instance is in my view higher than the ordinary civil standard of proof on a balance of probabilities. In *Bater v Bater* [1951] P 35 Denning LJ (as he then was) held: 'The degree depends on the subject matter. A civil court when considering a charge of fraud will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established. It does not adopt so high a degree as a criminal court even when considering a charge of a criminal matter; but still it does require a degree of probability which is commensurate with the subject matter ...'. The likelihood of the act of bribery having been committed is a serious subject matter that warrants this higher standard of proof. If the language used in the provisions of the first agreement resulted in ambiguity, the court should lean against finding that the agreement is illegal.

[49] In the circumstances, I am not satisfied and am accordingly unable to safely conclude that the final agreement is a sham whether objectively or as so alluded by Mr Lingam. This conclusion may perhaps be different after hearing the testimony of witnesses from Binary Vista but neither party saw it fit to call them. Consequently, I reject the contention that the final agreement is one that is tainted with illegality.

[50] Based on the facts and conclusions that I have found so far, both Lee Kok Hwa and Yap Kim Yoong are in breach of the final agreement for not refunding the payments to Bumimetro Construction according to cl 4 of the final agreement since the subcontract had not been awarded by Binary Vista to Bumimetro Construction. Both Lee Kok Hwa and Yap Kim Yoong have accordingly been unjustly enriched as well.

[51] I would not however go as far to find that Lee Kok Hwa and Yap Kim Yoong have defrauded or conspired to injure Bumimetro Construction. The standard of proof in this respect is the criminal standard of beyond a reasonable doubt as set out in *Saminathan v Pappa* [1981] 1 MLJ 121 (PC) and re-affirmed by the Federal Court in *Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd* [2007] 2 MLJ 301.

[52] It is plain that both Lee Kok Hwa and Yap Kim Yoong have at least kept to their bargain partially by having arranged the meeting between Bumimetro Construction and Binary Vista. It would be different if they have absconded in total failure of consideration after having obtained the payments from Bumimetro Construction. It is in my view also not the duty of a broker to

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ensure that the deal goes through in any event. Akin to real estate agency, the broker only 'match-make' the parties and the right to commission is often on contingency, to wit: dependent upon the success of the match-making. This contingency arrangement as intended has been made clear in cl 4 of the final agreement for payment refund if the subcontract is not awarded to Bumimetro Construction on the required terms as per cl 2(a). In the premises, I am not convinced that both Lee Kok Hwa and Yap Kim Yoong were in conspiracy together with Yee Hon Cheong to defraud Bumimetro Construction ab initio. They were no doubt in breach of contract for failure to refund after the deal brokered by them did not materialise.

[53] Consequently, I find and hold that Yap Kim Yoong is liable to pay damages to Bumimetro Construction for breach of contract, otherwise she would be unjustly enriched. In *Tay Choo Foo @ Tay Chiew Foo v Tengku Mohd Saad @ Tengku Arifaad bin Tengku Mansur & Ors (all acting as administrators of the estate of Tunku Mansur bin Tunku Yaacob, deceased) and another appeal* [2009] 1 MLJ 289, the Court of Appeal held that where a party unjustly obtains a benefit then the party alleged to have unjustly enriched itself and must be held accountable for such unjust enrichment. Since Yap Kim Yoong was entitled to an undisclosed share of the commission payment as testified by her, she must also alternatively in lieu of damages refund the money received to Bumimetro Construction in restitution.

[54] As for the second suit, it rests on the disputed issue of fact as to the purpose of the payment of RM500,000. Was it a friendly loan or part payment of the refund of the payments made under the final agreement? The receipt of the RM500,000 by Bumimetro Construction is not in issue. According to the testimony of Yap Kim Yoong, she met with PW1 on or around 4 August 2009 and orally agreed to lend RM500,000 to Bumimetro Construction who requested for the loan. The purpose of the loan was because Bumimetro Construction was in need of financial assistance. She could not however elaborate on the other terms of the loan such as the period and frequency of repayment as well as any interest rate chargable. The loan was given in the hope of getting future construction projects from Bumimetro Construction. Accordingly she directed DW2 to make the payment from the bank account of Projek Serimaju to Bumimetro Construction.

[55] Besides the lack of certainty in respect of the terms of the loan, I find that it does not make reasonable business sense for Bumimetro Construction who was willing to pay brokerage fee or commission of RM3,000,000 and having paid RM1,750,000 to want to borrow RM500,000 from Projek Serimaju that only has a mere paid-up capital of Two Ringgit. Moreover and as testified by DW2, Projeck Serimaju had not done any business since its inception in 2008. The loan was ironically made out from DW2's personal

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contribution into Projek Serimaju. The motivation in my view for so doing must have been at the request of PW2's father, Lee Kok Hwa. I noted at that point in time Bumimetro Construcion was seriously seeking to recover the sum of RM1,750,000 and had threatened civil litigation against Lee Kok Hwa.

[56] In the circumstances, I find and hold that the RM500,000 payment was not a friendly loan but a payment by Projek Serimaju on behalf of Yap Kim Yoong in part settlement of the refund money owing to Bumimetro Construction. Consequently, this amount has to be accordingly set-off against the claim of RM1,750,000 leaving only a balance of RM1,250,000 claimable in the first suit.

CONCLUSION

[57] Since Yap Kim Yoong is found to be in breach of contract and unjustly enriched, she is liable to pay damages or account by refunding the money received from Bumimetro Construction in the sum of RM1,250,000. I therefore order that judgment be entered for Bumimetro Construction Sdn Bhd in the sum of RM1,250,000 against Yap Kim Yoong in Civil Suit No 22–79 of 2010.

[58] By virtue of s 11 of the Civil Law Act 1956 and O 42 r 12 of the Rules of Court 2012 respectively, I further order payment of pre-judgment interest on the judgment sum of RM1,250,000 at 4%pa commencing from 4 June 2010–11 June 2014 and post-judgment interest at 5%pa from 12 June 2014 till full realisation by Yap Kim Yoong to Bumimetro Construction Sdn Bhd.

[59] I also order that costs of RM25,000 be paid by Yap Kim Yoong to Bumimetro Construction Sdn Bhd.

[60] In addition, the claim by Projek Serimaju Sdn Bhd in Civil Suit No 22-NCVC-877 of 2011 is hereby dismissed with costs RM15,000 be paid to Bumimetro Construction Sdn Bhd.

Bumimetro's claim against Yap allowed and project Serimaju's claim dismissed.

Reported by Ashok Kumar